

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION X

IN THE MATTER OF:

Terminal 117 Investigation

Seattle, Washington,

Port of Seattle,

Respondent.

ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION

U.S. EPA Region X
CERCLA Docket No.
Proceeding Under Sections 104, 106(a), 107
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, as amended, 42 U.S.C.
§§ 9604, 9606(a), 9607 and 9622.

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (Settlement Agreement) is entered into voluntarily by the United States Environmental Protection Agency, Region X (EPA), and the Port of Seattle (Port) as Respondent. This Settlement Agreement provides for the performance of a time-critical removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with such action for the Port of Seattle's Terminal 117 (T-117), which is located at approximately, but not limited to, River Mile 3.5 to 3.7 along the Duwamish Waterway, and within the Lower Duwamish Waterway Superfund Site (Site or LDW Site) in Seattle, Washington.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (CERCLA).

3. EPA has notified the State of Washington Department of Ecology (State or Ecology) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Ecology is co-managing and overseeing cleanup of the Site jointly with EPA.

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute admissions of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms. Respondent agrees to undertake all actions required by this Settlement Agreement,

1 including any modifications thereto, and consents to and will not contest EPA's authority to
2 issue or to enforce this Settlement Agreement. Except as expressly provided in this Settlement
3 Agreement, each party reserves all rights and defenses it may have.

4 5 **II. PARTIES BOUND**

6 5. This Settlement Agreement applies to and is binding upon EPA and upon
7 Respondent and its successors and assigns. Any change in governmental status of Respondent
8 including, but not limited to, any transfer of assets or real or personal property shall not alter
9 Respondent's responsibilities under this Settlement Agreement.

10 6. Respondent shall ensure that its contractors, subcontractors, and representatives
11 receive a copy of this Settlement Agreement within 14 days from the Effective Date or within 14
12 days of their contract to work on the project, and that they comply with this Settlement
13 Agreement. Respondent shall be responsible for any noncompliance with this Settlement
14 Agreement.

15 16 **III. DEFINITIONS**

17 7. Unless otherwise expressly provided herein, terms used in this Settlement
18 Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall
19 have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed
20 below are used in this Settlement Agreement or in the appendices attached hereto and
21 incorporated hereunder, the following definitions shall apply:

22 a. "CERCLA" shall mean the Comprehensive Environmental Response,
23 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

24 b. "Day" shall mean a calendar day. In computing any period of time under this
25 Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday,
26 the period shall run until the close of business of the next working day.

1 c. "Effective Date" shall be the effective date of this Settlement Agreement as
2 provided in Section XXX.

3 d. "Engineering Evaluation/Cost Analysis" (EE/CA) shall have the definition
4 and attributes described in the NCP, as may be modified by this Settlement Agreement.

5 e. "EPA" shall mean the United States Environmental Protection Agency and
6 any successor departments or agencies of the United States.

7 f. "Ecology" or "State" shall mean the State of Washington Department of
8 Ecology and any successor departments or agencies thereof.

9 g. "Future Response Costs" shall mean all costs, including, but not limited to,
10 direct and indirect costs, that the United States has incurred in planning, developing and
11 negotiating this Settlement Agreement, in reviewing or developing plans, reports and other items
12 pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing,
13 overseeing, or enforcing this Settlement Agreement, including, but not limited to, payroll costs,
14 contractor costs, travel costs, laboratory costs, costs incurred by EPA associated with EPA's
15 preparation of any EPA decision documents (including any Action Memoranda), the costs
16 incurred pursuant to Paragraph 23 (costs and attorneys fees and any monies paid to secure
17 access, including the amount of just compensation), Paragraph 33 (emergency response), and
18 Paragraph 59 (work takeover), as well as any other activities related to the T-117 Early Action
19 Area undertaken by EPA and/or Ecology at Respondent's request.

20 h. "Interest" shall mean interest at the rate specified for interest on investments
21 of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded
22 annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate
23 of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject
24 to change on October 1 of each year.

1 i. "National Contingency Plan" or "NCP" shall mean the National Oil and
2 Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of
3 CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

4 j. "Paragraph" shall mean a portion of this Settlement Agreement identified by
5 an Arabic numeral.

6 k. "Parties" shall mean EPA and Respondent.

7 l. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§
8 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

9 m. "Section" shall mean a portion of this Settlement Agreement identified by a
10 Roman numeral.

11 n. "Settlement Agreement" shall mean this Administrative Settlement
12 Agreement and Order on Consent and all appendices attached hereto (listed in Section XXIX).
13 In the event of conflict between this Settlement Agreement and any appendix, this Settlement
14 Agreement shall control.

15 o. "Statement of Work" or "SOW" shall mean the statement of work for
16 implementation of the removal action, as set forth in Appendix A to this Settlement Agreement,
17 and any modifications made thereto in accordance with this Settlement Agreement.

18 p. "Waste Material" shall mean 1) any "hazardous substance" under Section
19 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section
20 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any "solid waste" under Section 1004(27) of
21 RCRA, 42 U.S.C. § 6903(27); and 4) any "dangerous waste" under RCW 70.95E.010(1).

22 q. "Work" shall mean all activities Respondent is required to perform under this
23 Settlement Agreement.

24 **IV. FINDINGS OF FACT**

25
26 8. EPA finds the following facts which Respondent neither admits nor denies:

1 a. The Lower Duwamish Waterway Superfund Site (Site) consists of the areal
2 extent of contamination in the Lower Duwamish Waterway. The Waterway has served as
3 Seattle's major industrial corridor since it was first created by a widening and straightening of
4 the Lower Duwamish River (and formation of Harbor Island) by the United States Army Corps
5 of Engineers, completed in 1917. Industrial uses of and along the Waterway have been extensive
6 since its construction. The Waterway is also habitat to numerous fish and other aquatic species,
7 and is a migratory corridor for threatened, and other anadromous fish species. Sources of
8 releases to the Waterway include but are not limited to, industrial releases, combined sewer
9 overflows and urban run-off.

10 b. On September 13, 2001, the Site was listed on the National Priorities List
11 pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, at 66 Fed. Reg. 47583.

12 c. The Lower Duwamish Waterway, including the sediments in the vicinity of T-
13 117, has been the subject of numerous studies by various governmental and private entities
14 which Respondent (with three other parties) has assembled, integrated and evaluated during
15 Phase I of the RI process required by the Lower Duwamish Waterway CERCLA remedial
16 action/feasibility study (RI/FS) Administrative Order on Consent (AOC) issued in December
17 2000 to Respondent and three other parties. In 2003, pursuant to the LDW RI/FS AOC, the
18 sediments and bank in the general vicinity of T-117 were identified as a candidate "Early Action
19 Area" (the T-117 EAA). Contaminants found at T-117 and in adjacent sediments to date
20 include, but are not limited to, polychlorinated biphenyls (PCBs), poly-aromatic hydrocarbons
21 (PAHs), mercury, other metals and organics. EPA decided to move forward with early action
22 clean up at T-117 due primarily to high levels of PCBs located in the vicinity of T-117 along the
23 western side of the LDW. EPA anticipates entering into a Settlement Agreement with
24 Respondent and the City of Seattle (City) for the performance of a non-time-critical removal
25 action for the T-117 EAA.
26

1 d. T-117 was formerly the location of an asphalt roofing materials manufacturing
2 facility owned and operated from approximately 1937 to 1993 by persons other than Respondent,
3 including the Malarkey Asphalt Company and the Duwamish Manufacturing Company, located
4 at 8700 Dallas Avenue South, Seattle, Washington. Based on circumstantial evidence, historical
5 sources of PCB contamination were primarily from PCB-contaminated oil from Seattle City
6 Light used as fuel oil by the Duwamish Manufacturing Company in the 1970's. Based on
7 circumstantial evidence, operational practices over subsequent decades at the facility spread the
8 contamination. There may also have been other sources of PCBs that contaminated T-117 soils
9 and sediments.

10 e. In 1996, pursuant to a CERCLA 106 AOC issued to the Malarkey Asphalt
11 Company, an assessment of soil contamination was performed with EPA oversight. Thereafter,
12 claiming it could not afford to remove PCB-contaminated soils, the Malarkey Asphalt Company
13 transferred ownership of the facility to the Port in exchange for performance by the Port of a
14 PCB removal required by EPA. In 2000, pursuant to a CERCLA 106 AOC issued to the Port, a
15 time critical removal action removed upland soils in areas of the facility exceeding 25 ppm.
16 Most of the removed contaminated soil was on a strip of land composed mainly of fill material of
17 unknown origin and composition adjacent to the LDW.

18 f. Pursuant to the RI/FS AOC for the LDW Site, a Work Plan for Investigation
19 Tasks for the T-117 EAA (Work Plan) dated May 29, 2003, was submitted by Respondent and
20 approved by EPA. Pursuant to that Work Plan, EPA has approved the following documents for
21 the T-117 EAA: 1) Summary of Existing Information and Identification of Data Gaps, dated
22 September 26, 2003; 2) Quality Assurance Project Plan (QAPP), dated December 3, 2003; and
23 3) T-117 EE/CA, dated July 13, 2005. EPA also issued a non-time critical removal (NTCR)
24 Action Memorandum on July 22, 2005 for the T-117 EAA. The QAPP covered surface and
25 subsurface sediment characterization in the Waterway in front of T-117 eastward to the
26 navigation channel and soil borings along the bank of T-117, including the vicinity in front of the

1 earlier soil excavation by Respondent pursuant to the removal AOC issued to Respondent by
2 EPA in 2000. After submission of the Draft Sediments Cruise and Data Report by Respondent,
3 higher than expected PCB concentrations in the bank and sediments at the northern part of the T-
4 117 EAA led EPA to require further sampling of this area.

5 g. The Port of Seattle is a Washington Port District, duly created under RCW
6 Chap. 53. The Port is the successor to Commercial Waterway District #1, which acquired the
7 Waterway properties and created the Waterway in 1912 - 1917.

8 h. EPA has not completed a Potentially Responsible Party search for the Site or
9 for the upland area in the vicinity of T-117. Additional parties may be responsible for releases
10 and contamination at the Site and at T-117.

11 i. Respondent has been cooperating in the performance of the necessary
12 response actions to date with respect to the T-117 EAA.

13 **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

14
15 9. Based on the Findings of Fact set forth above, EPA has determined that:

16 a. T-117 is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. §
17 9601(9).

18 b. The contamination found at T-117, as identified in the Findings of Fact above,
19 includes “hazardous substances” as defined by Section 101(14) of CERCLA, 42 U.S.C. §
20 9601(14), and/or pollutants or contaminants which may present an imminent and substantial
21 danger to the public health or welfare.

22 c. Respondent is a “person” as defined by Section 101(21) of CERCLA, 42
23 U.S.C. § 9601(21).

24 d. Respondent is a responsible party under Section 107(a) of CERCLA, 42
25 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for
26 response costs incurred and to be incurred at T-117. Respondent is an “owner” and/or “operator”

1 of a portion of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20),
2 and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

3 e. The conditions described in the Findings of Fact above constitute an actual or
4 threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of
5 CERCLA, 42 U.S.C. § 9601(22).

6 f. The removal action required by this Settlement Agreement is necessary to
7 protect the public health, welfare, or the environment and, if carried out in compliance with the
8 terms of this Settlement Agreement, will be considered consistent with the NCP, as provided in
9 Section 300.700(c)(3)(ii) of the NCP.

10 **VI. SETTLEMENT AGREEMENT AND ORDER**

11
12 Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the
13 Administrative Record for the Site, it is hereby Ordered and Agreed that Respondent shall
14 comply with all provisions of this Settlement Agreement, including, but not limited to, all
15 attachments to this Settlement Agreement and all documents incorporated by reference into this
16 Settlement Agreement.

17 **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR**

18
19 10. Respondent shall retain one or more contractors to perform the Work and shall
20 notify EPA of the name(s) and qualifications of such contractor(s) within 10 days of the
21 Effective Date. Respondent shall also notify EPA in writing of the name(s) and qualification(s)
22 of any other contractor(s) or subcontractor(s) retained to perform the Work at least 7 days prior
23 to commencement of such Work. EPA retains the right to disapprove of any or all of the
24 contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected
25 contractor in writing, Respondent shall retain a different contractor and shall notify EPA of that
26 contractor’s name and qualifications within 30 days of EPA’s disapproval.

11. Within 7 days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present or readily available during field Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within 7 days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent. Within 7 days after Respondent's selection of a Project Coordinator, Respondent shall submit a written plan and accompanying schedule to EPA setting forth how, including all bidding processes for necessary personnel and equipment, Respondent will implement the Work required by this Settlement Agreement.

12. EPA has designated Ravi Sanga of the Office of Environmental Cleanup (ECL), Region X, as its Project Coordinator. Except as otherwise provided in this Settlement Agreement, Respondent shall direct all submissions required by this Settlement Agreement to the EPA Project Coordinator at 1200 Sixth Avenue, M/S ECL-111, Seattle, WA 98101.

13. EPA and Respondent shall have the right, subject to Paragraph 11, to change their respective designated Project Coordinator. Respondent shall notify EPA 7 days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

14. Respondent shall perform, at a minimum, all actions necessary to implement the Statement of Work (SOW), which is attached as Appendix A.

1 15. The actions to be implemented generally include, but are not limited to, soil
2 sampling at T-117, as set forth in the SOW.

3 16. The EPA Guidance on Conducting Time-Critical Removal Actions under
4 Superfund and any additional relevant guidance shall be followed in implementing the SOW.

5 17. The primary objective of this removal action is to carry out sampling activities to
6 identify potential risks to human health and the environment resulting from potential exposure to
7 contaminants present at T-117.

8 18. For all Work, EPA may approve, disapprove, require revisions to, or modify a
9 deliverable in whole or in part. If EPA requires revisions, Respondent shall submit a revised
10 deliverable within 10 days of receipt of EPA's notification of the required revisions, unless
11 otherwise noted in the SOW. Respondent shall implement the Work as approved in writing by
12 EPA in accordance with the schedule approved by EPA. Once approved, or approved with
13 modifications, the Work and the schedule, and any subsequent modifications, shall be
14 incorporated into and become fully enforceable under this Settlement Agreement.

15 19. Respondent shall not commence any Work except in conformance with the terms
16 of this Settlement Agreement. Respondent shall not commence implementation of the Work
17 developed hereunder until after receiving written EPA approval pursuant to this Section.

18 20. Reporting.

19 a. Respondent shall submit a written progress report to EPA concerning actions
20 undertaken pursuant to this Settlement Agreement every 30th day after the Effective Date until
21 termination of this Settlement Agreement, unless otherwise directed in writing by the EPA
22 Project Coordinator. These reports shall describe all significant developments during the
23 preceding period, including the actions performed and any problems encountered, analytical data
24 received during the reporting period, and the developments anticipated during the next reporting
25 period, including a schedule of actions to be performed, anticipated problems, and planned
26 resolutions of past or anticipated problems.

1 b. At least 30 days prior to the conveyance of any interest in real property at T-
2 117 owned or controlled by Respondent, Respondent shall give written notice to the transferee
3 that the property is subject to this Settlement Agreement and written notice to EPA and Ecology
4 of the proposed conveyance, including the name and address of the transferee. Respondent also
5 agrees to require that its successor(s), if any, comply with the immediately preceding sentence
6 and Sections IX (Site Access) and X (Access to Information).

7 21. Off-Site Shipments.

8 a. Respondent shall, prior to any off-site shipment of Waste Material derived
9 from the implementation of this Settlement Agreement from T-117 to an out-of-state waste
10 management facility, provide written notification of such shipment of Waste Material to the
11 appropriate state environmental official in the receiving facility's state and to the EPA Project
12 Coordinator. However, this notification requirement shall not apply to any off-site shipments
13 when the total volume of all such shipments will not exceed 10 cubic yards.

14 i. Respondent shall include in the written notification the following
15 information: 1) the name and location of the facility to which the Waste Material is to be
16 shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule
17 for the shipment of the Waste Material; and 4) the method of transportation. Respondent shall
18 notify the state in which the planned receiving facility is located of major changes in the
19 shipment plan, such as a decision to ship the Waste Material to another facility within the same
20 state, or to a facility in another state.

21 ii. The identity of the receiving facility and state will be determined
22 by Respondent following the award of the contract for the removal action. Respondent shall
23 provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the
24 award of the contract and before the Waste Material is actually shipped.

25 b. Before shipping any hazardous substances, pollutants, or contaminants from
26 T-117 to an off-site location, Respondent shall obtain EPA's certification that the proposed

1 receiving facility is operating in compliance with the requirements of CERCLA Section
2 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send
3 hazardous substances, pollutants, or contaminants from T-117 to an off-site facility that EPA has
4 certified as in compliance with the requirements of the statutory provision and regulation cited in
5 the preceding sentence.

6 **IX. ACCESS**

7
8 22. Respondent shall, commencing on the Effective Date, provide EPA and its
9 representatives, including contractors, with access at all reasonable times to T-117 for the
10 purpose of conducting any activity related to this Settlement Agreement. EPA shall provide
11 reasonable notice to Respondent under the circumstances concerning any EPA activities under
12 this Settlement Agreement for which access to T-117 will be necessary, and absent emergency
13 circumstances, shall attempt to coordinate with Respondent to minimize disruption to
14 Respondent's tenants and other parties authorized to use Respondent's property.

15 23. Where any action under this Settlement Agreement is to be performed in areas
16 owned by or in possession of someone other than Respondent, Respondent shall use its best
17 efforts to obtain all necessary access agreements within 30 days after the Effective Date, or as
18 otherwise specified in writing by the EPA Project Coordinator. Respondent shall immediately
19 notify EPA if after using their best efforts it is unable to obtain such agreements. For purposes
20 of this Paragraph, "best efforts" includes the payment of reasonable sums of money in
21 consideration of access. Respondent shall describe in writing their efforts to obtain access. EPA
22 may then assist Respondent in gaining access, to the extent necessary to effectuate the response
23 actions described herein, using such means as EPA deems appropriate. Respondent shall
24 reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such
25 access, in accordance with the procedures in Section XV (Payment of Response Costs).
26

1 24. Notwithstanding any provision of this Settlement Agreement, EPA retains all of
2 its access authorities and rights, as well as all of its rights to require land/water use restrictions,
3 including enforcement authorities related thereto, under CERCLA, RCRA, and any other
4 applicable statutes or regulations.

5
6 **X. ACCESS TO INFORMATION**

7 25. Respondent shall provide copies to EPA, upon request, of all documents and
8 information within its possession or control or that of its contractors or agents relating to
9 activities at T-117 or to the implementation of this Settlement Agreement, including, but not
10 limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts,
11 reports, sample traffic routing, correspondence, or other documents or information related to the
12 Work. Respondent shall also make available to EPA, for purposes of investigation, information
13 gathering, or testimony, its employees, agents, or representatives with knowledge of relevant
14 facts concerning the performance of the Work.

15 26. Respondent may assert business confidentiality claims covering part or all of the
16 documents or information submitted to EPA under this Settlement Agreement, specifically
17 including contractor costs and documentation thereof, but specifically excluding deliverables
18 required by the attached SOW on which EPA may rely in remedy selection either for T-117 or
19 for the Site, to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA,
20 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be
21 confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If
22 no claim of confidentiality accompanies documents or information when they are submitted to
23 EPA, or if EPA has notified Respondent that the documents or information are not confidential
24 under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public
25 may be given access to such documents or information without further notice to Respondent.
26

27. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege in lieu of providing documents, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

28. No claim of confidentiality shall be made with respect to any data submitted or to be considered by EPA with respect to T-117 or the Site, including, but not limited to, all sampling, analytical, monitoring, hydro-geologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around T-117.

XI. RECORD RETENTION

29. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to T-117, regardless of any corporate retention policy to the contrary. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

30. At the conclusion of this document retention period, Respondent shall notify EPA and Ecology at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or Ecology, Respondent shall deliver any such records or documents to EPA or Ecology. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA or Ecology with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

31. Respondent hereby certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding T-117 since notification of potential liability by EPA or Ecology or the filing of suit against it regarding T-117 and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

32. Respondent shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the

1 exigencies of the situation, attain applicable or relevant and appropriate requirements under
2 federal environmental, tribal environmental, or state environmental or facility siting laws.

3 **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

4
5 33. In the event of any action or occurrence during performance of the Work which
6 causes or threatens to cause a release of Waste Material from T-117 that constitutes an
7 emergency situation or may present an immediate threat to public health or welfare or the
8 environment, Respondent shall immediately take all appropriate action. Respondent shall take
9 these actions in accordance with all applicable provisions of this Settlement Agreement, in order
10 to prevent, abate or minimize such release or endangerment caused or threatened by the release.
11 Respondent shall also immediately notify the EPA Project Coordinator or, in the event of his/her
12 unavailability, the Regional Duty Officer, Environmental Cleanup Office, Emergency Response
13 Unit, EPA Region X, 206-553-1263, of the incident or conditions. In the event that Respondent
14 fails to take appropriate response action as required by this Paragraph, and EPA takes such action
15 instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with
16 the NCP pursuant to Section XV (Payment of Response Costs).

17 34. In addition, in the event of any release of a hazardous substance from T-117,
18 Respondent shall immediately notify the EPA Project Coordinator and the National Response
19 Center at (800) 424-8802. Respondent shall submit a written report to EPA within 7 days after
20 each release, setting forth the events that occurred and the measures taken or to be taken to
21 mitigate any release or endangerment caused or threatened by the release and to prevent the
22 reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of,
23 reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the
24 Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001, *et seq.*

1 **XIV. AUTHORITY OF EPA PROJECT COORDINATOR**

2
3 35. The EPA Project Coordinator shall be responsible for overseeing Respondent's
4 implementation of this Settlement Agreement. The Project Coordinator shall have the authority
5 vested in an On-Scene Coordinator (OSC) by the NCP, including the authority to halt, conduct,
6 or direct any Work required by this Settlement Agreement, or to direct any other removal action
7 undertaken at T-117, as well as the authority of a Remedial Project Manager (RPM) as set forth
8 in the NCP. Absence of the EPA Project Coordinator from T-117 shall not be cause for stoppage
9 of work unless specifically directed by the EPA Project Coordinator.

10 **XV. PAYMENT OF RESPONSE COSTS**

11
12 36. Payments for Future Response Costs.

13 a. Respondent shall pay EPA all Future Response Costs not inconsistent with the
14 NCP. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a
15 SCORPIOS or other regionally prepared cost summary, which includes direct and indirect costs
16 incurred by EPA and its contractors. Respondent shall make all payments within 30 days of
17 receipt of each bill requiring payment, except as otherwise provided in Paragraph 39 of this
18 Settlement Agreement.

19 b. Respondent shall make all payments required by this Paragraph by a certified
20 or cashier's check or checks made payable to "EPA Hazardous Substance Superfund,"
21 referencing the name and address of the parties making payment, the Docket Number of this
22 Settlement Agreement, and EPA Site/Spill ID number 10AJ, and shall be clearly designated as
23 Response Costs: LDW-T-117. Respondent shall send the check(s) to:

24 Mellon Bank
25 EPA-Region 10 Superfund
26 P.O. Box 371099M
 Pittsburgh, PA 15251

1 c. At the time of payment, Respondent shall send notice that payment has been
2 made, as indicated in Paragraph 12 above, to the Financial Management Officer, Environmental
3 Protection Agency, Region 10, 1200 Sixth Avenue, M/S OMP-146, Seattle, Washington 98101-
4 1128.

5 37. The total amount to be paid by Respondent pursuant to this Section shall be
6 deposited in the Lower Duwamish Waterway Superfund Site Special Account within the EPA
7 Hazardous Substance Superfund to be retained and used to conduct or finance response actions at
8 or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance
9 Superfund.

10 38. If payments for Future Response Costs are not made within 30 days of
11 Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest
12 on Future Response Costs shall begin to accrue on the date of Respondent's receipt of the bill
13 and shall continue to accrue until the date of payment. Payments of Interest made under this
14 Paragraph shall be in addition to such other remedies or sanctions available to the United States
15 by virtue of Respondent's failure to make timely payments under this Section, including, but not
16 limited to, payment of stipulated penalties pursuant to Section XVIII.

17 39. Respondent may dispute all or part of a bill for Future Response Costs submitted
18 under this Settlement Agreement, if Respondent alleges that EPA has made an accounting error,
19 or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs
20 is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is
21 not resolved before payment is due, Respondent shall pay the full amount of the uncontested
22 costs to EPA as specified in this Section on or before the due date. Within the same time period,
23 Respondent shall pay the full amount of the contested costs into an interest-bearing escrow
24 account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in
25 this Section above, together with a copy of the correspondence that established and funds the
26 escrow account, including, but not limited to, information containing the identity of the bank and

1 bank account under which the escrow account is established as well as a bank statement showing
2 the initial balance of the escrow account. Respondent shall ensure that the prevailing party or
3 parties in the dispute shall receive the amount upon which they prevailed from the escrow funds
4 plus interest within 10 days after the dispute is resolved.

5 **XVI. DISPUTE RESOLUTION**

7 40. Unless otherwise expressly provided for in this Settlement Agreement, the dispute
8 resolution procedures of this Section shall be the exclusive mechanism for resolving disputes
9 arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements
10 concerning this Settlement Agreement expeditiously and informally.

11 41. If Respondent objects to any EPA action taken pursuant to this Settlement
12 Agreement, including billings for Future Response Costs, it shall notify EPA in writing of its
13 objection(s) within 14 days of such action, unless the objection(s) has/have been resolved
14 informally. EPA and Respondent shall have 14 days from EPA's receipt of Respondent's
15 written objection(s) to resolve the dispute through formal negotiations (the Negotiation Period).
16 The Negotiation Period may be extended at the sole discretion of EPA.

17 42. Any agreement reached by the parties pursuant to this Section shall be in writing
18 and shall, upon signature by both parties, be incorporated into and become an enforceable part of
19 this Settlement Agreement. If the Parties are unable to reach an agreement within the
20 Negotiation Period, the Director of the EPA Region X Office of Environmental Cleanup Office
21 or his/her Associate Director (ECL Director) will issue a written decision on the dispute to
22 Respondent. EPA's decision shall be incorporated into and become an enforceable part of this
23 Settlement Agreement. Respondent's obligations under this Settlement Agreement shall not be
24 tolled by submission of any objection for dispute resolution under this Section. Following
25 resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement
26 that was the subject of the dispute in accordance with the agreement reached or with EPA's

1 decision, whichever occurs. Any written statement of objections submitted by Respondent and
2 any accompanying documentation shall be retained by EPA in an Administrative Record at the
3 written request of Respondent or at EPA's discretion if there is no written retention request by
4 Respondent.

5 **XVII. FORCE MAJEURE**

7 43. Respondent agrees to perform all requirements of this Settlement Agreement
8 within the time limits established under this Settlement Agreement, unless the performance is
9 delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is
10 defined as any event arising from causes beyond the control of Respondent, or of any entity
11 controlled by Respondent, including, but not limited to, their contractors and subcontractors,
12 which delays or prevents performance of any obligation under this Settlement Agreement despite
13 Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial
14 inability to complete the Work, increased cost of performance, or a failure to attain performance
15 standards/action levels selected by EPA.

16 44. If any event occurs or has occurred that may delay the performance of any
17 obligation under this Settlement Agreement, whether or not caused by a *force majeure* event,
18 Respondent shall notify EPA orally within 24 hours of when Respondent first knew that the
19 event might cause a delay. Within 10 days thereafter, Respondent shall provide to EPA in
20 writing an explanation and description of the reasons for the delay; the anticipated duration of
21 the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for
22 implementation of any measures to be taken to prevent or mitigate the delay or the effect of the
23 delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to
24 assert such a claim, including supporting documentation for such a claim; and a statement as to
25 whether, in the opinion of Respondent, such event may cause or contribute to an endangerment
26 to public health, welfare or the environment. Failure to comply with the above requirements

1 shall preclude Respondent from asserting any claim of *force majeure* for that event for the period
2 of time of such failure to comply and for any additional delay caused by such failure.

3 45. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure*
4 event, the time for performance of the obligations under this Settlement Agreement that are
5 affected by the *force majeure* event will be extended by EPA for such time as is necessary to
6 complete those obligations. An extension of the time for performance of the obligations affected
7 by the *force majeure* event shall not, of itself, extend the time for performance of any other
8 obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused
9 by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees
10 that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of
11 the length of the extension for performance of the obligations affected by the *force majeure*
12 event.

13 **XVIII. STIPULATED PENALTIES**

14
15 46. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth
16 in this Section for failure to comply with the requirements of this Settlement Agreement
17 specified below, unless excused under Section XVII (*Force Majeure*). “Compliance” by
18 Respondent shall include completion of the activities under this Settlement Agreement or any
19 work plan or other plan approved under this Settlement Agreement identified below in
20 accordance with all applicable requirements of law, this Settlement Agreement, all Appendices,
21 and any plans or other documents approved by EPA pursuant to this Settlement Agreement and
22 within the specified time schedules established by and approved under this Settlement
23 Agreement.

24 47. Stipulated Penalty Amounts - Work.

25 a. The following stipulated penalties shall accrue per violation per day for any
26 noncompliance identified in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 7th day
\$ 2,000	8th through 14th day
\$ 3,500	15th through 30th day
\$ 7,500	31st day through 90th day

b. The final and all submitted drafts of the following Compliance Milestones:

1. Work Plan;
2. Quality Assurance Project Plan;
3. Data Report and Technical Memorandum.

48. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate final and all submitted draft reports or other written documents pursuant to this Settlement Agreement that are not listed in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 7th day
\$ 1,00	8th day through 14th day
\$ 2,500	15th through 30th day
\$ 5,000	31st day through 90th day

49. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the ECL Director under Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the ECL Director issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

1 50. Following EPA's determination that Respondent has failed to comply with a
2 requirement of this Settlement Agreement, EPA may give Respondent written notification of the
3 failure and describe the noncompliance. EPA may send Respondents a written demand for
4 payment of the penalties. However, penalties shall accrue as provided in the preceding
5 Paragraph regardless of whether EPA has notified Respondents of a violation.

6 51. All penalties accruing under this Section shall be due and payable to EPA within
7 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless
8 Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution).
9 All payments to EPA under this Section shall be paid by certified or cashier's check(s) made
10 payable to "EPA Hazardous Substances Superfund," shall be mailed to the Lockbox number and
11 address set forth in Paragraph 36b, above, shall indicate that the payment is for stipulated
12 penalties, and shall reference the EPA Region and Site/Spill ID Number 10AJ, the EPA Docket
13 Number of this Settlement Agreement, and the name and address of the parties making payment.
14 Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s),
15 shall be sent to EPA as provided in Paragraph 12, and to other receiving officials at EPA
16 identified in Paragraph 36c, above.

17 52. The payment of penalties shall not alter in any way Respondent's obligation to
18 complete performance of the Work required under this Settlement Agreement.

19 53. Penalties shall continue to accrue during any dispute resolution period, but need
20 not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's
21 decision.

22 54. If Respondent fails to pay stipulated penalties when due, EPA may institute
23 proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the
24 unpaid balance, which shall begin to accrue on the date of demand made pursuant to
25 Paragraph 50.
26

1 55. Nothing in this Settlement Agreement shall be construed as prohibiting, altering,
2 or in any way limiting the ability of EPA to seek any other remedies or sanctions available by
3 virtue of Respondent's violation of this Settlement Agreement or of the statutes and regulations
4 upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and
5 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section
6 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil
7 penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to
8 Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided
9 herein, except in the case of a willful violation of this Settlement Agreement or in the event that
10 EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 59.
11 Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion,
12 waive any portion of stipulated penalties that have accrued pursuant to this Settlement
13 Agreement.

14
15 **XIX. COVENANT NOT TO SUE BY EPA**

16 56. In consideration of the actions that will be performed and the payments that will
17 be made by Respondent under the terms of this Settlement Agreement, and except as otherwise
18 specifically provided in this Settlement Agreement, EPA covenants not to sue or to take
19 administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42
20 U.S.C. §§ 9606 and 9607(a), for the Work and for Future Response Costs. This covenant not to
21 sue shall take effect upon the Effective Date and is conditioned upon the complete and
22 satisfactory performance by Respondent of all obligations under this Settlement Agreement,
23 including, but not limited to, payment of Future Response Costs pursuant to Section XV. This
24 covenant not to sue extends only to Respondent and does not extend to any other person.
25
26

1 **XX. RESERVATIONS OF RIGHTS BY EPA**

2
3 57. Except as specifically provided in this Settlement Agreement, nothing herein shall
4 limit the power and authority of EPA or the United States to take, direct, or order all actions
5 necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize
6 an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous
7 or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking
8 legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other
9 legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in
10 the future to perform additional activities pursuant to CERCLA or any other applicable law.

11 58. The covenant not to sue set forth in Section XIX above does not pertain to any
12 matters other than those expressly identified therein. EPA reserves, and this Settlement
13 Agreement is without prejudice to, all rights against Respondent with respect to all other matters,
14 including, but not limited to:

- 15 a. claims based on a failure by Respondent to meet a requirement of this
16 Settlement Agreement;
- 17 b. liability for costs not included within the definition of Future Response Costs;
- 18 c. liability for performance of response action other than the Work;
- 19 d. criminal liability;
- 20 e. liability for damages for injury to, destruction of, or loss of natural resources,
21 and for the costs of any natural resource damage assessments;
- 22 f. liability arising from the past, present, or future disposal, release or threat of
23 release of Waste Materials outside of T-117; and
- 24 g. liability for costs incurred or to be incurred by the Agency for Toxic
25 Substances and Disease Registry related to the T-117.
- 26

1 59. Work Takeover. In the event EPA determines that Respondent has ceased
2 implementation of any portion of the Work, is seriously or repeatedly deficient or late in its
3 performance of the Work, or is implementing the Work in a manner which may cause an
4 endangerment to human health or the environment, EPA may assume the performance of all or
5 any portion of the Work as EPA determines necessary. Respondent may invoke the procedures
6 set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of
7 the Work is warranted under this Paragraph. Costs incurred by the United States in performing
8 the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondent
9 shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other
10 provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take
11 any and all response actions authorized by law.

12
13 **XXI. COVENANT NOT TO SUE BY RESPONDENT**

14 60. Respondent covenants not to sue and agrees not to assert any claims or causes of
15 action against the United States, or its contractors or employees, with respect to the Work, Future
16 Response Costs, or this Settlement Agreement, including, but not limited to:

17 a. any direct or indirect claim for reimbursement from the Hazardous Substance
18 Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113
19 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

20 b. any claim arising out of response actions at or in connection with T-117,
21 including any claim under the United States Constitution, the Washington State Constitution, the
22 Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended,
23 or at common law; or

24 c. any claim against the United States pursuant to Sections 107 and 113 of
25 CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to T-117. The covenants not to sue in this
26 section shall not apply in the event the United States brings a cause of action or issues an order

1 pursuant to the reservations set forth in Paragraphs 58 (b), (c), and (e) - (g), but only to the extent
2 that Respondent's claims arise from the same response action, response costs, or damages that
3 the United States is seeking pursuant to the applicable reservation.

4 61. Nothing in this Agreement shall be deemed to constitute approval or
5 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or
6 40 C.F.R. § 300.700(d).

7 **XXII. OTHER CLAIMS**

8
9 62. By issuance of this Settlement Agreement, the United States and EPA assume no
10 liability for injuries or damages to persons or property resulting from any acts or omissions of
11 Respondent. The United States or EPA shall not be deemed a party to any contract entered into
12 by Respondent or its directors, officers, employees, agents, successors, representatives, assigns,
13 contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

14 63. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA),
15 nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or
16 cause of action against Respondent or any person not a party to this Settlement Agreement, for
17 any liability such person may have under CERCLA, other statutes, or common law, including,
18 but not limited to, any claims of the United States for costs, damages and interest under Sections
19 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

20 64. No action or decision by EPA pursuant to this Settlement Agreement shall give
21 rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C.
22 § 9613(h).

23 **XXIII. CONTRIBUTION**

24
25 65. The Parties agree that:
26

1 a. This Settlement Agreement constitutes an administrative settlement for
2 purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondent is
3 entitled, as of the Effective Date, to protection from contribution actions or claims as provided
4 by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for
5 “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement
6 Agreement are the Work and Future Response Costs.

7 b. This Settlement Agreement constitutes an administrative settlement for
8 purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which
9 Respondent has, as of the Effective Date, resolved its liability to the United States for the Work
10 and Future Response Costs.

11 c. Nothing in this Settlement Agreement precludes the United States or
12 Respondent from asserting any claims, causes of action, or demands for indemnification,
13 contribution, or cost recovery against any persons not parties to this Settlement Agreement.
14 Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3)
15 of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional
16 response costs or response action and to enter into settlements that give rise to contribution
17 protection pursuant to Section 113(f)(2).

18 66. Respondent agrees that with respect to any suit or claim for contribution brought
19 by them for matters related to this Settlement Agreement, it will notify EPA in writing no later
20 than 60 days prior to the initiation of such suit or claim. Respondent further agree that with
21 respect to any suit or claim for contribution brought against it for matters related to this
22 Settlement Agreement, it will notify EPA in writing within 10 days of service of the complaint
23 on them. In addition, Respondent shall notify EPA within 10 days of service or receipt of any
24 Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a
25 case for trial.
26

1 67. In any subsequent administrative or judicial proceeding initiated by the United
2 States for injunctive relief, recovery of response costs, or other appropriate relief relating to T-
3 117 or this Settlement Agreement, Respondent shall not assert, and may not maintain, any
4 defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue
5 preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by
6 the United States in the subsequent proceeding should have been addressed in this Settlement
7 Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the
8 covenants not to sue set forth in this Settlement Agreement.

9 10 **XXIV. INDEMNIFICATION**

11 68. Respondent shall indemnify, save and hold harmless the United States, its
12 officials, agents, contractors, subcontractors, employees and representatives from any and all
13 claims or causes of action arising from, or on account of, negligent or other wrongful acts or
14 omissions of Respondent, its officers, directors, employees, agents, contractors, or
15 subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition,
16 Respondent agrees to pay the United States all costs incurred by the United States, including, but
17 not limited to, attorneys fees and other expenses of litigation and settlement, arising from or on
18 account of claims made against the United States based on negligent or other wrongful acts or
19 omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors
20 and any persons acting on their behalf or under their control, in carrying out activities pursuant to
21 this Settlement Agreement. The United States shall not be held out as a party to any contract
22 entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement
23 Agreement. Neither Respondent nor any such contractor shall be considered an agent of the
24 United States.

69. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

70. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to T-117, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the T-117, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

71. At least 7 days prior to commencing any field Work under this Settlement Agreement, Respondent shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of 5 million dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Settlement Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or

1 lesser amount, then Respondent need provide only that portion of the insurance described above
2 which is not maintained by such contractor or subcontractor.

3 **XXVI. FINANCIAL ASSURANCE**

4
5 72. Within 30 days of the Effective Date and on the anniversary of the Effective Date
6 every year thereafter until Notice of Completion of Work in accordance with Section XXVIII
7 below is received from EPA, Respondent shall establish and maintain financial security in the
8 amount of \$500,000.00 to assure the Work and any other obligations required under this
9 Settlement Agreement in one or more of the following forms:

- 10 a. A surety bond guaranteeing performance of the Work;
11 b. One or more irrevocable letters of credit equaling the total estimated cost of
12 the Work;
13 c. A trust fund;
14 d. A guarantee to perform the Work by one or more parent corporations or
15 subsidiaries, or by one or more unrelated corporations that have a substantial business
16 relationship with Respondent; or
17 e. A demonstration that Respondent satisfies the requirements of 40 C.F.R. Part
18 264.143(f).

19 73. If Respondent seeks to demonstrate the ability to complete the Work through a
20 guarantee by a third party pursuant to Paragraph 72(a) of this Section, Respondent shall
21 demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If
22 Respondent seeks to demonstrate its ability to complete the Work by means of the financial test
23 or the corporate guarantee pursuant to Paragraph 72(d) or (e) of this Section, it shall resubmit
24 sworn statements conveying the information required by 40 C.F.R. 264.143(f) annually, on the
25 anniversary of the Effective Date. In the event that EPA determines at any time that the financial
26 assurances provided pursuant to this Section are inadequate, Respondent shall, within 30 days of

1 receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other
2 forms of financial assurance listed in Paragraph 72 of this Section. Respondent's inability to
3 demonstrate financial ability to complete the Work shall not excuse performance of any activities
4 required under this Settlement Agreement.

5 74. If, after the Effective Date, Respondent can show that the estimated cost to
6 complete the remaining Work has diminished below \$500,000.00, Respondent may, on any
7 anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the
8 amount of the financial security provided under this Section to the estimated cost of the
9 remaining Work to be performed. Respondent shall submit a proposal for such reduction to
10 EPA, in accordance with the requirements of this Section, and may reduce the amount of the
11 security upon approval by EPA. In the event of a dispute, Respondent may reduce the amount of
12 the security in accordance with the written decision resolving the dispute.

13 75. Respondent may change the form of financial assurance provided under this
14 Section at any time, upon notice to and approval by EPA, provided that the new form of
15 assurance meets the requirements of this Section. In the event of a dispute, Respondent may
16 change the form of the financial assurance only in accordance with the written decision resolving
17 the dispute.

18 **XXVII. MODIFICATIONS**

19
20 76. The EPA Project Coordinator may make modifications to any plan or schedule in
21 writing or by oral direction. Any oral modification will be memorialized in writing by EPA
22 promptly, but shall have as its effective date the date of the EPA Project Coordinator's oral
23 direction. Any other requirements of this Settlement Agreement may be modified in writing by
24 mutual agreement of the parties.

25 77. If Respondent seeks permission to deviate from any approved work plan or
26 schedule or Statement of Work, Respondent's Project Coordinator shall submit a written request

1 to EPA for approval outlining the proposed modification and its basis. Respondent may not
2 proceed with the requested deviation until receiving oral or written approval from the EPA
3 Project Coordinator pursuant to Paragraph 76.

4 78. No informal advice, guidance, suggestion, or comment by the EPA Project
5 Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or
6 any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain
7 any formal approval required by this Settlement Agreement, or to comply with all requirements
8 of this Settlement Agreement, unless it is formally modified.

9 **XXVIII. NOTICE OF COMPLETION OF WORK**

10
11 79. When EPA determines, after EPA's review of the Final Data Report and
12 Technical Memorandum, as required by the SOW, that all Work has been fully performed in
13 accordance with this Settlement Agreement, with the exception of any continuing obligations
14 required by this Settlement Agreement, including post-removal site controls and monitoring, if
15 any, payment of Future Response Costs, or record retention, EPA will provide written notice to
16 Respondent. If EPA determines that any such Work has not been completed in accordance with
17 this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and
18 require that Respondent correct such deficiencies. Respondent shall implement the modified and
19 approved Work Plan and shall submit a modified Final Data Report and Technical Memorandum
20 in accordance with the EPA notice. Failure by Respondent to implement the approved modified
21 Work Plan shall be a violation of this Settlement Agreement.

22 **XXIX. SEVERABILITY/INTEGRATION/APPENDICES**

23
24 80. If a court issues an order that invalidates any provision of this Settlement
25 Agreement or finds that Respondent has sufficient cause not to comply with one or more
26 provisions of this Settlement Agreement, Respondent shall remain bound to comply with all

1 provisions of this Settlement Agreement not invalidated or determined to be subject to a
2 sufficient cause defense by the court's order.

3 81. This Settlement Agreement and its appendices constitute the final, complete and
4 exclusive agreement and understanding among the Parties with respect to the settlement
5 embodied in this Settlement Agreement. The parties acknowledge that there are no
6 representations, agreements or understandings relating to the settlement other than those
7 expressly contained in this Settlement Agreement. The following appendices are attached to and
8 incorporated into this Settlement Agreement:

9 a. Appendix A: Statement of Work.

10 b. Appendix B: Map generally depicting T-117.

11 **XXX. EFFECTIVE DATE**

12
13 82. This Settlement Agreement shall be effective on the day it is issued by EPA. The
14 undersigned representatives of Respondent certify that they are fully authorized to enter into the
15 terms and conditions of this Settlement Agreement and to bind the parties they represent to this
16 document.

17 **XXXI. NOTICES AND SUBMISSIONS**

18
19 83. Documents including work plans, reports, approvals, disapprovals, and other
20 correspondence which must be submitted under this Settlement Agreement, shall be sent to the
21 individuals at the addresses specified below, unless those individuals give written notice of a
22 change to the other parties. All notices and submissions shall be considered effective one
23 business day after receipt by Respondent's Project Coordinator, unless otherwise provided.
24 Upon request by EPA, Respondent shall submit such documents in electronic form.
25
26

1 a. Twelve (12) copies of documents to be submitted to EPA shall be forwarded
2 to:

3 Ravi Sanga
4 U.S. Environmental Protection Agency
1200 Sixth Avenue, ECL-111
Seattle, Washington 98101

5 b. One (1) copy of documents to be submitted to EPA shall be forwarded to:

6 Rick Huey
7 Washington Department of Ecology
Northwest Regional Office
8 3190 160th Avenue SE
Bellevue, Washington 98504

9 c. Two (2) copies of documents to be submitted to EPA shall be forwarded to:

10 Kym Takasaki
11 U.S. Army Corps of Engineers, Seattle District
P.O. Box 3755
12 Seattle, WA 98124-2255

13 It is so ORDERED and AGREED.

14 By Sheila Eckman Date 10/07/05
15 Sheila Eckman
16 ECL Unit Manager
U.S. EPA, Region X

17
18 For Respondent Port of Seattle:

19
20 By _____ Date _____
21 M.R. Dinsmore
Chief Executive Officer _____
22 Title: _____
23
24
25
26

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17 Seattle, WA 98124-2255

18 It is so ORDERED and AGREED.

19 By _____ Date _____
20 Sheila Eckman
21 ECL Unit Manager
22 U.S. EPA, Region X

23 For Respondent Port of Seattle:

24 By M.R. Dinsmore Date October 14, 2005
25 M.R. Dinsmore
26 Chief Executive Officer
Title: _____